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March 5, 2018

Submitted via email to the National Freedom of Information Officer (hq.foia@epa.gov)

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Appeal of Request No. EPA-HQ-2018-003680

Dear National Freedom of Information Officer:

Ecological Rights Foundation (“EcoRights”), via their public interest counsel at Environmental Advocates, hereby appeals the determination of the Environmental Protection Agency (“EPA”) made in an email from Kush Khatri, Government Information Specialist, Office of Acquisition Management, EPA dated February 13, 2018. This email responded to EcoRights’ FOIA request dated January 23, 2018 (EPA-HQ-2018-003680). As discussed further below, EcoRights objects that EPA has: 1, improperly issued a partial rejection of EcoRights’ request for documents, 2, made an inadequate search for documents, 3, has improperly withheld documents without adequate justification that the documents are exempt under FOIA, and 4, has failed to promptly produce documents.

As you should be aware, EcoRights sent EPA a FOIA request on February 1, 2017, requesting documents related to Gag Orders and Political Review Orders promulgated by the agency since the inauguration of President Trump (EPA-HQ-2017-003479). EPA failed to make a final determination within the statutory deadline or to release any documents related to this request. EcoRights felt compelled to file a federal lawsuit against EPA to address EPA’s failure to comply with FOIA, which is currently pending in the Northern District of California (case no. 18-cv-394). We trust that EPA will reach a determination on this appeal within FOIA’s 20 working day deadline set forth at 5 U.S.C. § 552(a)(6)(A)(ii) and will limit its withholding to those documents that EPA can meet its burden to show are truly exempt from disclosure.

EcoRights submitted a FOIA request on January 23, 2018, requesting documents related to a contract EPA awarded and then rescinded to Definers Corporation in December 2017, as well as documents related to EPA's communications with employees of Definers Corp. and affiliates, and documents related to EPA's internal policies or practices of investigating the political expressions of EPA employees. EPA sent a response to EcoRights' January 23, 2018 FOIA request on February 13, 2018 via an email from Kush Khatri to EcoRights' counsel. This email informed EcoRights that their FOIA request was "too broad and does not identify any specific documents such as purchase order number." The email further informed that the request was being forwarded to the EPA Office of Acquisition Management and that some documents related to the contract file would be released to EcoRights by February 28, 2018. EPA further informed that:

Regarding correspondence: You have to clarify that and file another FOIA request specific to those documents properly identifying them. Most of the time internal correspondence is treated as internal deliberations and is not released under Exemption 5 of the FOIA.

EcoRights interprets this email to be a final determination on EcoRights January 23, 2018 FOIA request. EPA expressed that it would provide a partial grant of EcoRights request – releasing some of the contract related documents located in the Office of Acquisition Management – and that it would deny the rest of EcoRights' request. Although the FOIAonline website still lists the final disposition of EcoRights' FOIA request as "Undetermined", EcoRights interprets EPA's directive to file another FOIA request to mean that EPA is no longer searching for documents and effectively denying EcoRights' request.

EPA does not provide any guidance or clarification regarding why it believes EcoRights' request is "unclear and too broad", instead merely directing that EcoRights file yet another request to ask for the same documents. EPA has provided no direction to EcoRights as to how their request is overbroad, and has signaled that even if EcoRights were to submit another FOIA request for internal correspondence, it would likely be denied. EPA is circumventing FOIA's deadlines by requiring EcoRights to submit another request, stalling the process. But in this situation, timely disclosure of the requested documents is of the essence. Documents responsive to EcoRights' request would reveal whether EPA is conducting investigations of its own employees based on their political expressions, and therefore shed light on whether EPA's practices may be hindering the ability of EPA employees to perform their job functions.

Kush Khatri sent an additional email that was received by EcoRights' counsel today, March 5, 2018, providing an update that contract-related documents are under review and will be released to FOIAonline "shortly." This email reinforces that EPA has

decided not to release any requested documents other than the contract-related documents. And as of the filing of this appeal, EPA has not released any records to EcoRights on FOIAonline.

First, EPA's assertion that EcoRights' FOIA request is "unclear and too broad" lacks merit. EcoRights has fully satisfied FOIA's requirements that a request "reasonably describe[]" the records and that it be made in accordance with the agency's published FOIA regulations. 5 U.S.C. § 552(a)(3)(A). EPA is therefore in violation of FOIA's requirement that documents responsive to the requirement that documents be made "promptly available." *Id.*

As the D.C. Circuit instructs, "Although a requester must 'reasonably describe[]' the records sought, 5 U.S.C. § 552(a)(3), an agency also has a duty to construe a FOIA request liberally." *Nation Magazine, Wash. Bureau v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). This reflects the House and Senate reports accompanying 1974 amendments that added the "reasonably describes" standard, which clarified that "the FOIA should not be used to obstruct public access to agency records" and that the amendment "makes explicit the liberal standard for identification that Congress intended." *Truitt v. United States Dep't of State*, 897 F.2d 540, 544-45 (D.C. Cir. 1990) (internal citations omitted). A FOIA requester's description of the records that they seek is reasonable if it "enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Id.* at 545 n.36 (internal quotation mark omitted). "Although a requester must 'reasonably describe[]' the records sought, 5 U.S.C. § 552(a)(3), an agency also has a duty to construe a FOIA request liberally." *Nation Magazine*, 71 F.3d at 891. *See also Truitt*, 897 F.2d at 544-45 ("FOIA [requirement that request reasonably describe records] should not be used to obstruct public access to agency records") (citing Senate Report accompanying relevant provision of FOIA); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836-37 (D.C. Cir. 1979) (same).

Here, EcoRights' request was more than sufficient to guide an EPA employee to find responsive documents with reasonable effort. EcoRights' request is perfectly clear with respect to the internal correspondence requested. EcoRights requested correspondence within a limited timeframe, from January 20, 2017 to the present. Moreover, EcoRights identified the subject matter and parties involved in the correspondence requested. For instance, EcoRights requested correspondence between any EPA employees or Trump Administration officials and any employee of Definers Corp., Definers Public Affairs, America Rising, or America Rising Squared. EPA could have easily located this information using keyword search terms of "Definers" or "America Rising". Moreover, EcoRights even specifically requested correspondence between EPA and Allan Blutstein. EPA could have reasonably searched for these documents.

Moreover, EPA's assertion that EcoRights' FOIA request "is too broad and does not identify any specific documents such as purchase order number" is itself vague, and factually inaccurate. EcoRights included the contract number it was requesting in its January 23, 2018 FOIA request. In addition, the government may not respond to a FOIA request with boilerplate or conclusory statements; rather, it must provide "tailored reasons" for withholding documents. *Wiener v. FBI*, 943 F. 2d 972, 978-79 (9th Cir. 1991). Therefore, EPA's denial of EcoRights' FOIA request on the unsupported basis that the request is overbroad is inadequate and violates the law.

Second, EPA failed to conduct an adequate search for records in response to EcoRights' FOIA request. EPA is required to perform a reasonable search, which means meaning looking through all files likely to contain responsive materials. *Shapiro v. CIA*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016); 5 U.S.C. § 552(a)(3)(C). It appears from the Khatri email that EPA did not even attempt to search for the requested documentation related to correspondence with Definers Corp. employees or internal policies. Instead, EPA forwarded the entire request to the Office of Acquisition Management and indicated that it would only release the contract related documents requested by EcoRights. As discussed above, EPA could have reasonably searched for EcoRights' requested internal documents and correspondence with Definers Corp. employees and affiliates via keyword searches. Confining the search to a single department unreasonably limited the scope of the search, preventing EPA from collecting the documents that EcoRights requested.

Third, EcoRights objects to EPA's assertion that "[m]ost of the time" internal correspondence is exempt under FOIA exemption 5. This statement is both an inadequate grounds for denying EcoRights request and blatantly contrary to law. The government may not respond to a FOIA request with boilerplate or conclusory statements; rather, it must provide "tailored reasons" for withholding documents. *Wiener*, 943 F. 2d at 978-79. When documents are withheld under the deliberative process privilege, agencies must demonstrate that the document is both predecisional and deliberative.

EPA's suggestion that the deliberative privilege would apply to "most" internal correspondence is troubling in that it signals a disregard for the law and a stark departure from FOIA's intent to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). The FOIA Improvement Act of 2016 ("Improvement Act"), enacted on June 30, 2016, made significant amendments to FOIA, including changes further tightening the standard by which EPA must evaluate withholdings. 5 U.S.C. § 522, § 6; Department of Justice Office of Information Policy Summary of the FOIA Improvement Act of 2016, available at <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> ("OIP FOIA 2016 Summary"). The FOIA Improvement Act of 2016 dictates that agencies must do more than simply demonstrate a document falls within a FOIA exemption; agencies shall now withhold information only if disclosure would harm an interest protected by an exemption – what is referred to as the "foreseeable harm standard." 5 U.S.C. § 552(a)(8)(A)(i); OIP FOIA 2016 Summary.

Further, government agencies bear the burden of proof to show that any withheld documents are properly exempt from disclosure. 5 U.S.C. § 552(a)(4)(B); *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012); *Willamette Industries, Inc. v. U.S.*, 689 F.2d 865, 868 (9th Cir. 1982). When an agency withholds documents under a claim of exemption, it must “notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i) (emphasis added); *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990). 5 U.S.C. § 552(a)(6)(A)(i) “requires that the agency provide enough information, presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what has not been produced and why and the court can decide whether the exemptions claimed justify the nondisclosure.” *Fiducia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999).

EPA's characterization of the blanket use of the deliberative process exemption to avoid disclosure of internal communications is a blatantly false and misleading characterization of the law. The assertion is especially inapplicable in this situation because at least some of the documents requested by EcoRights obviously would not fall under the deliberative process exemption, as they relate to correspondence between EPA and people outside of EPA, i.e., correspondence between EPA and employees of Definers Corp. These documents have already been disclosed outside the agency. If disclosure has already occurred, the government has little interest in secrecy. *Starkey v. DOI*, 238 F. Supp. 2d 1188, 1193 (S.D. Cal. 2002) (public availability of documents waived exemptions); see *Goodrich v. EPA*, 593 F. Supp. 2d 184, 192 (D.D.C. 2009) (EPA's failure to “jealously guard” its protected information cut against it); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (disclosure may be compelled even over otherwise valid agency exemption claim when agency has effectively revealed information).

Even if some of the documents EcoRights requests do properly fall under the deliberative process exemption, FOIA further requires that “any reasonably segregable portion of a record” must be released after application of the Act's nine exemptions. 5 U.S.C. § 552(b); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167, (D.C. Cir. 2011). The Improvement Act further added that an agency shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.” 5 U.S.C. § 552(a)(8)(A)(ii). It appears likely that EPA has not complied with the requirement that when asserting that a document contains materials exempt from disclosure, the agency must segregate and release any purely factual material. See *Roth v. United States DOJ*, 642 F.3d 1161, 1186-87 (D.C. Cir. 2011); see also *NRDC v. U.S. Dep't of Def.*, 442 F.Supp.2d 857, 872 (C.D. Cal. 2006).

Fourth, EPA has failed to promptly produce documents, in violation of 5 U.S.C. § 552(a)(3)(A). As discussed above, EPA has improperly instructed EcoRights to submit yet another FOIA request, therefore avoiding promptly producing documents responsive to their January 23, 2018 request. Additionally, although EPA informed EcoRights that it

would release contract related documents by February 28, 2018, it did not do so. As of the date of this request, EPA has not released any documents to EcoRights related to the January 23, 2018 request, and the FOIAonline website reflects that “No records have been released.”

In sum, EcoRights appeals EPA’s partial denial of EcoRights’ January 23, 2018 FOIA request. EcoRights requests a full grant of the documents related to the request, and prompt production of the requested documents.

We request that the government provide electronic copies of its response to this request – as well as any responsive documents that may be transmitted via e-mail – to me at the following e-mail addresses:

Christopher Sproul: csproul@enviroadvocates.com
Heather Kryczka: heather@enviroadvocates.com
Molly Coyne: mcoyne@enviroadvocates.com

Please send any documents that must be sent via regular mail to the following address:

Christopher Sproul
Environmental Advocates
5135 Anza St.
San Francisco, California, 94121

Your staff may contact me at (630) 544-9977 or heather@enviroadvocates.com to further discuss your response to this appeal. Thank you for your prompt attention to this matter.

Sincerely,



Heather Kryczka
Counsel for Ecological Rights Foundation